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No.

In The

Supreme Court of the United States

October Term, 1997

NEWCO, INC.,

Petitioner,

vs.

THE CESSNA AIRCRAFT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the requirement of de novo review of state law determinations by Federal Courts of Appeal under Salve Regina College v. Russell, 499 U.S. 225 (1991) satisfied when the Court fails to acknowledge the applicable standard of review in its decision, and the decision fails to reference or discuss binding and compelling authority from the state's highest court indicating that the state court would likely reach a different result?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Petitioner, Newco, Inc. is an affiliate of United Payors & United Providers, Inc., a Delaware corporation. The Respondent, The Cessna Aircraft Company, is a subsidiary of Textron, Inc., a Delaware corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

APPENDIX vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Facts Material To The Consideration Of The Question Presented 3

B. The Proceedings Below 5

REASONS FOR GRANTING THE WRIT 8

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE HOLDING IN SALVE REGINA COLLEGE V. RUSSELL THEREBY CALLING FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION 8

A. Kansas Precedent Applicable To The Contract Construction Issue Was Ignored By The Court Of Appeals 8

B. The Kansas Authorities Relied On By The Court of Appeals Do Not Support Its Decision On The Contract Issue 12

C. The Court Of Appeals Improperly Expounded On An Unresolved Question Of Maryland Tort Law .. 15

CONCLUSION 18

TABLE OF CITATIONS

Cases Cited:

Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984). 2

Burris Chemical Inc. v. U.S.X. Corp., 10 F.3d 243 (4th Cir. 1993). 17

Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir. 1977). 16

Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982). 16, 17

D.R. Lauck Oil Company, Inc. v. Breitenbach, 20 Kan. App. 2d 897, 893 P.2d 286 (1995). 11

Desbien v. Penokee Farmers Union Coop. Ass'n,
228 Kan. 358, 552 P.2d 917 (1976) 10, 12, 14

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). 2, 18

Geier v. Eagle-Cherokee Coal Mining Co.,
181 Kan. 567, 313 P.2d 731 (1957) 10

Hall v. JFW, Inc., 20 Kan. App. 2d 845,
893 P.2d 837 (1995). 14

Hall v. Mullen, 234 Kan.1031, 678 P.2d 169 (1984). .. 12, 14

Hanscome v. W.J. Coppinger, 183 Kan. 623,
331 P.2d 590 (1958) 9

Haynes Hardware Co. v. Western Casualty & Surety Co.,
156 Kan. 356, 133 P.2d 574 (1943) 10

Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943). 10

Holywell Corp. v. Smith, 503 U.S. 47 (1992). 9

Mark Twain Kansas City Bank v. Cates, 248 Kan. 700,
810 P.2d 1154 (1991) 8

McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657
(3rd Cir.) cert. denied 449 U.S. 976 (1980). 17

Salve Regina College v. Russell,
499 U.S. 225 (1991) 2, 7, 8, 17, 18

Simon v. National Farmers' Org., Inc., 250 Kan 676,
829 P.2d 884 (1992). 12, 13

Smith v. Russ, 184 Kan. 773, 339 P.2d 286 (1959) 10, 11

TMG Lake Ins. Co. v. Ashner, 21 Kan. App.2d 234, 898 P.2d 1145 (1995). 13

Weber v. Tillman, 259 Kan. 457, 913 P.2d 84 (1996). .. 8, 15

Weisman v. Conners, 312 Md. 428, 540 A.2d 783 (1988). . 15

Wood River Pipeline Co. v. Willbros Energy Services, Co., 241 Kan. 580, 723 P.2d 866 (1987) 9, 14

Statutes Cited:

28 U.S.C. §1332(a)(1). 5

28 U.S.C. §1652 3

28 U.S.C. §1441 5

28 U.S.C. §1291 7

28 U.S.C. §1294(1) 7

Kan. Stat. Ann. §84-1-207 (1983) 4

Kan. Stat. Ann. §84-2-609 (1983) 4

Kan. Stat. Ann. §84-3-118 (1983) 10

Rules Cited:

FRAP 35 7

FRAP 40 7

Other Authorities Cited:

Black's Law Dictionary, 118-119, (6th ed. 1990) 10

Webster's Third New International Dictionary, 132 (1986) . 9

APPENDIX

Appendix A - Unpublished Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit Filed November 12, 1997 ..... 1a

Appendix B - Order of the United States District Court for the District of Maryland, Southern Division, Granting Cessna's Motion to Dismiss and Denying Newco's Motion for Partial Summary Judgment Filed January 30, 1997 ..... 7a

Appendix C - Oral Opinion of the United States District Court for the District of Maryland, Southern Division, Granting Cessna's Motion to Dismiss and Denying Newco's Motion for Partial Summary Judgment Delivered on January 27, 1997 .... 10a

Appendix D - Order of the United States Court of Appeals for the Fourth Circuit Denying Newco Inc.'s Petition for Rehearing Filed December 8, 1997 ..... 16a

Appendix E - Contract of Purchase Between Newco, Inc. and The Cessna Aircraft Company dated August 30, 1994 ..... 18a

Petitioner, Newco, Inc. respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Newco, Inc. v. Cessna Aircraft Company, No. 97-1208 (4th Cir. Nov. 12, 1997) is an unpublished per curiam opinion and is reproduced in the appendix to the petition. (App. A). The opinion of the United States District Court for the District of Maryland in Newco, Inc. v. Cessna Aircraft Company, CA-96-2896-AW (D. Md. Jan. 27, 1997) was delivered orally and also is reproduced in the appendix to the petition. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on November 12, 1997. (App. A). The Court of Appeals denied a timely petition for rehearing on December 8, 1997. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 ("State laws as rules of decision") provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

The question presented for resolution by this petition is what does and does not satisfy the minimum standard for de novo review under Salve Regina College v. Russell, 499 U.S. 225 (1991). In order to insure that the Federal Courts of Appeals were honoring their obligation under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) of applying the substantive law of the forum state when adjudicating state law claims, this Court in Salve Regina directed them to review de novo the state law determinations of district courts. However, the Court of Appeals failed to acknowledge that standard of review in reaching its decision in the instant case. Furthermore, the opinion lacks the careful and comprehensive review of the pertinent legal authorities of the states whose law the Court purported to apply.

In Salve Regina this Court observed that "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" Id. at 238 citing Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 501 (1984). This maxim is sorely tested in this case, though not so much by deference as indifference. In this instance, the Court of Appeals selectively employed limited principles of Kansas contract law and Maryland tort law in order to avoid its duty under Erie and to instead achieve the outcome it desired. In so doing, the Court of Appeals violated its obligation under 28

U.S.C. §1652 and Erie to decide the issues in this diversity action in the manner that the highest state courts would have decided the issues.

A. Facts Material To The Consideration Of The Question Presented.

On August 30, 1994, Petitioner, Newco, Inc. (hereinafter "Newco"), contracted with Respondent, The Cessna Aircraft Company (hereinafter "Cessna"), to purchase the eighth production model of a new business-class jet aircraft which, at that time, was still in the design stage. The purchase price was $6.295 million and the scheduled delivery date was four years later in May, 1998. In agreeing to enter into the contract, Newco specifically negotiated the right to assign the agreement without restriction; a condition which Newco contends that Cessna accepted. Thus, in defining the term - "Purchaser" - under Cessna's pre-printed form contract, Cessna's sales manager handwrote the following: "Newco, Inc. or assignee". (App. E, p.18a). The contract was then forwarded to Cessna's home office for final approval along with Newco's initial deposit of $125,000.

Two years later, Cessna sent an invoice to Newco for the next installment of $250,000 called for by the terms of the agreement. Upon receiving the bill, Newco wrote Cessna and asked that the agreement be assigned to a corporation known as United Payors & United Providers, Inc. and that a corrected invoice be sent. Cessna refused to honor the requested assignment relying on a "boiler plate" provision in the "General Terms" section of the agreement which purported to restrict the "Purchaser" [defined by the agreement as "Newco, Inc. or assignee"] from assigning the agreement except "to a wholly-owned subsidiary or successor in interest by name change. . . ." (App. E, p.26a, ¶6).

After Cessna informed Newco that it would not agree to the assignment, Newco invoked 2-609 of the Kansas Uniform Commercial Code (UCC)[1], Kan. Stat. Ann. §84-2-609 (1983). Pursuant to that authority, Newco notified Cessna that it wanted written assurances from Cessna that it would honor the unrestricted right of assignment and that it intended to suspend payment of the installment of $250,000 currently due under the most recent invoice until those assurances were received. Alternatively, Newco offered to pay the installment under a "reservation of rights" pending a final resolution of their disagreement pursuant to §1-207 of the Kansas UCC. Kan. Stat. Ann. §84-1-207 (1983).[2] Newco sent five separate written notifications to Cessna in a span of 8 weeks advising that it was invoking its right to suspend performance pending receipt of adequate assurances concerning its right to assign the agreement. Cessna did not provide those assurances, and it also refused Newco's offer to tender its performance under a "reservation of rights". Instead, Cessna unilaterally declared a default based on the purported failure to pay the second installment, and proceeded to resell the production slot for the aircraft.

Newco filed suit in Maryland state court asserting claims for anticipatory repudiation/breach of contract under Kansas law, or alternatively, negligent misrepresentation under Maryland law. Thereafter, Cessna filed a Notice of Removal to the United States District Court for the District of Maryland, Southern Division. In its complaint, Newco initially sought injunctive relief. However, once

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[1] The Kansas UCC was made applicable to the agreement by the express language of section IV, paragraph 9 of the contract. (App. E, p.27a, ¶9).

[2] The parties' contract specified that any installment paid was non-refundable. Tendering performance under a "reservation of rights" would have altered that contract provision.

Cessna announced that it had resold the aircraft, Newco instead claimed damages. Specifically, Newco alleged that Cessna refused to honor the requested assignment and unilaterally declared a breach because the jet aircraft had appreciated in value from $6.295 million to $7.8 million subsequent to the time the parties entered into their contract. Permitting Newco to assign its contract would potentially mean that Cessna would lose a $1.505 million profit margin.

B. The Proceedings Below.

Newco initiated this action on August 23, 1996 by filing a complaint in the Circuit Court for Montgomery County, Maryland alleging anticipatory repudiation/breach of contract under Kansas law and negligent misrepresentation under Maryland law against Cessna. On September 16, 1996, Cessna filed a Notice of Removal in the United States District Court for the District of Maryland, Southern Division, pursuant to 28 U.S.C. §1441. Subject matter jurisdiction was premised upon diversity of citizenship under 28 U.S.C. §1332(a)(1). The value of the contract in dispute is $6.295 million; Newco is a Maryland corporation, and Cessna is a Kansas corporation.

Cessna initially answered the Complaint, then later filed a Motion to Dismiss. In its Motion, Cessna contended that the handwritten term - "or assignee" - was intended to be nothing more than further explication of the pre-printed form language concerning assignment contained in the "boiler plate" portion of the agreement.[3]

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[3] In its brief below, Cessna claimed that the phrase - "or assignee" - was included as part of the definition of "Purchaser" because this additional phrase somehow "clarified" the restrictive assignment language appearing later in the pre-printed text. In discovery responses, however, Cessna

It urged that the two provisions were consistent and unambiguous when considered together. With respect to the negligent misrepresentation claim, Cessna contended that Maryland did not recognize a duty in tort where the relationship between the parties were merely contractual.

Newco responded to Cessna's motion by filing a combined Opposition and Cross-Motion for Partial Summary Judgment on the liability portion of the breach of contract claim under Kansas law. In its pleading Newco argued that handwritten terms in printed agreements are accorded additional evidentiary weight under Kansas law, and accordingly, the mere presence of a handwritten term in this type of agreement required the district court to apply the pertinent contract construction tenets of Kansas case law in order to resolve the question. The application of those rules indisputably compelled a result in favor of Newco. Newco responded to Cessna's argument on the negligent misrepresentation claim by pointing to an April, 1996 Maryland appellate decision which recognized that a tort duty for purposes of a negligent misrepresentation action could arise in a contractual relationship based on a partial or fragmentary disclosure which was misleading because of its incompleteness.

The district court granted Cessna's motion, and denied Newco's motion. Immediately following the court's oral ruling, Cessna made an unopposed oral motion to dismiss its counterclaim seeking to forfeit the deposit of $125,000 Newco paid at the time the contract was signed. The district court also granted that request. A final order disposing of all claims was entered on January 30, 1997. (App. B, pp.7a-10a).

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[3] *Cont'd.* admitted that the subject contract is the only occasion out of more than 100 similar such agreements where it felt constrained to make this "clarification".

On February 7, 1997, Newco noted an appeal to the United States Court of Appeals for the Fourth Circuit in accordance with 28 U.S.C. §§1291 & 1294(1). The issues were fully briefed by the parties and oral argument was heard by a panel of the Court on September 29, 1997. Six weeks later, the Court issued its unpublished per curiam opinion affirming the judgment of the district court. (App. A). In its November 12, 1997 decision, the Court of Appeals found that "although the definition of 'Purchaser' as 'Newco, Inc. or assignee' clearly reflects that the parties contemplated that Newco might assign its rights, nothing in that definition indicates an intention to grant Newco an unrestricted right of assignment." (App. A, pp.4a-5a). With respect to the negligent misrepresentation claim under Maryland law, the Court of Appeals relied on an argument that was not advanced by the parties. The Court held that the claim could not be maintained because such an assertion was "directly contradicted by specific language in the contract itself, [and] Newco's reliance on Cessna's representation was unjustifiable as a matter of law." (App. A., p.6a).

On November 25, 1997, Newco filed a Petition for Rehearing and Suggestion for Rehearing In Banc, or In The Alternative, Motion to Vacate the Opinion and to Certify Questions to the Kansas Supreme Court and to the Maryland Court of Appeals pursuant to FRAP 35 and FRAP 40. In that motion, Newco argued that the Court had not undertaken a de novo review of Kansas contract law as required by Salve Regina College v. Russell, supra. Instead, the Court improperly indulged its own preferences regarding how it believed the case should be decided. Newco also challenged the Court's summary disposition of the tort claim under Maryland law by pointing to a 1982 decision from the Maryland Court of Appeals that expressly reserved ruling on the precise point of law upon which the Court had based its decision. The Court of Appeals denied that Petition and Motion in an order filed December 8, 1997. The Court then filed its mandate in the case on December 16, 1997.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE HOLDING IN SALVE REGINA COLLEGE v. RUSSELL THEREBY CALLING FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

A. Kansas Precedent Applicable To The Contract Construction Issue Was Ignored By The Court Of Appeals.

This diversity action involved the application of the state law of Kansas to a contract claim, and the state law of Maryland to a claim for negligent misrepresentation. The Court of Appeals opinion violates this Court's holding in Salve Regina College v. Russell, 499 U.S. 225 (1991) because: (1) it fails to undertake a de novo determination of Kansas contract law in construing and interpreting the subject contract; and (2) it attempted to determine a novel issue of Maryland tort law in a manner not "in accordance with the applicable principles for determining state law." Id. at 226-27.

In Salve Regina, this Court held that in a diversity case in which a federal court is applying state law "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying Erie require that courts of appeals review the state-law determinations of district courts de novo." 499 U.S. at 239. Here the Court's analysis fails to meet that standard and the concomitant requirement of de novo review of contract interpretation questions mandated by the Kansas Supreme Court. See Weber v. Tillman, 259 Kan. 457, 476, 913 P.2d 84, 86 (1996); Mark Twain Kansas City Bank v. Cates, 248 Kan. 700, 704, 810 P.2d 1154, 1157 (1991). The district court cited no cases under Kansas law to support its decision, and the Court of Appeals referred

to only four citations in one five-sentence paragraph to support the result it reached. Moreover the holding in the two Kansas Supreme Court decisions are inapposite to the Court's ultimate conclusion in the case, and the two Kansas intermediate appellate court decisions are readily distinguishable from the present case.

But all the more noteworthy was the conspicuous absence of other decisions from the Kansas Supreme Court and Kansas Court of Appeals cited by Newco which, as part of a true de novo analysis, should have been discussed and distinguished in order for the decision below to constitute a result in accordance with how the highest applicable state court would decide the issue.

- There was no analysis or discussion of the fact that "[i]t has long been the rule that provisions specially written into a printed form [contract] are to be given particular attention and weight." Hanscome v. W.J. Coppinger, 183 Kan. 623, 626, 331 P.2d 590, 594 (1958).

- There was no analysis of the requirement that the hand-written term "assignee" be given its plain, common and generally understood meaning.[4] Wood River Pipeline Co.

[4] In its opinion, the Court of Appeals found nothing to indicate "an intention to grant Newco an unrestricted right of assignment" (App. A, pp.4a-5a). However, the intent emanates from: (1) the mere presence of the handwritten term; (2) the requirement under Kansas law that "assignee" be given its usual, customary and ordinary meaning; and (3) this Court's prior recognition of "[t]he usual definition of the word assignee in both ordinary and legal usage. See Webster's Third New International Dictionary, 132 (1986) (defining an 'assignee' as 'one to whom a right or property is legally transferred.'); Black's Law Dictionary, 118-119, (6th ed. 1990) (defining an 'assignee' as '[a] person to whom an assignment is made' and 'an assignment' as '[t]he act of transferring to another all or part of one's property, interest, or rights . . . .'" Holywell Corp. v. Smith, 503 U.S. 47,

v. Willbros Energy Services, Co., 241 Kan. 580, 723 P.2d 866 (1987).

- There was no analysis of the requirement that "[w]here part of a contract is printed and part of a contract is handwritten or typed by filling in blanks in a printed form, handwritten or typed words will control over the printed part." (emphasis supplied) Desbien v. Penokee Farmers Union Co-op. Ass'n, 220 Kan. 358, 363, 552 P.2d 917, 923 (1976); see also Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943).

- There was no analysis of Kan. Stat. Ann. §84-3-118 (1983) which expressly provides that "handwritten terms control typewritten and printed terms."

- There was no analysis of whether the handwritten term should be regarded as a specific versus a general term when compared to the printed term. Smith v. Russ, 184 Kan. 773, 339 P.2d 286 (1959). This distinction was important because if there is uncertainty between the general provisions of a contract and particular provisions written into the contract, preference is given to the latter for the purpose of ascertaining the intent of the parties. Geier v. Eagle-Cherokee Coal Mining Co., 181 Kan. 567, 313 P.2d 731, 736 (1957); Haynes Hardware Co. v. Western Casualty & Surety Co., 156 Kan. 356, 362, 133 P.2d 574, 579 (1943). The Kansas Supreme Court would likely have treated the handwritten term or interlineation as the specific provision with the "reasonable inference

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[4] *Cont'd.* 53 (1992). Nothing in the foregoing definition by this Court suggests any inherent limitation on the right of assignment when the term "assignee" is used.

[being] that the specific provision expresses more exactly what the parties intended rather than broad or general clauses which do not necessarily indicate that the parties had the particular matter in thought." Smith v. Russ, 184 Kan. 773, 339 P.2d 286 (1959).

- There was no analysis concerning the exception to the general rule of Kansas contract construction law that requires all provisions to be read together, and not in isolation. The exception holds that the general rule "...does not require that dissimilar contract provisions be given the same interpretation." D.R. Lauck Oil Company, Inc. v. Breitenbach, 20 Kan. App. 2d 897, 881, 893 P.2d 286, 290 (1995). Nothing could be more dissimilar than a hand-written term when compared to a preprinted contract provision on the same subject, especially considering the greater weight and deference accorded the handwritten term under Kansas law.

- Finally, there was no analysis of the fact that Newco, Inc. or assignee is a "defined term" for Purchaser under the express terms of the contract, and whether substituting the definition in the later restrictive assignment provision gives rise to uncertainty or a doubtful meaning.[5] To find otherwise, the Court would have to conclude that when read together the handwritten contract term inserted into the agreement and the later pre-printed language using the

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[5] Inserting "Newco, Inc. or assignee" in place of "Purchaser" in section IV, paragraph 6 of the contract, causes the agreement to read as follows: "This Agreement, including the rights of Newco, Inc. or assignee hereunder, may not be assigned by Newco, Inc. or assignee except to a wholly owned-subsidiary, successor in interest by name change or otherwise and then only upon the prior written consent of the seller."

> defined term - "Newco, Inc. or assignee" - "express[es] clearly and positively, the true intent of the parties." Hall v. Mullen, 234 Kan.1031, 678 P.2d 169 (1984).

In sum, the failure to reference the above authorities in its opinion as well as its failure to even acknowledge the applicable standard of review cannot be reconciled with the Court of Appeal's obligation to interpret state law rather than fashioning it.

B. The Kansas Authorities Relied On By The Court of Appeals Do Not Support Its Decision On The Contract Issue.

On closer scrutiny, the citations relied on by the Court of Appeals do not support the result reached on the contract interpretation issue. The Court cited Simon v. National Farmers' Org., Inc., 250 Kan 676, 829 P.2d 884 (1992) for the proposition that "[a]mbiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it generally uncertain which one of two or more meanings is the proper meaning." (emphasis supplied) (App. A, p.4a). This language acknowledges that divergent meanings can be urged by the parties and that the pertinent rules of interpretation under Kansas law can be applied prior to making a finding that an ambiguity exists and the court receiving parol evidence to resolve the ambiguity. Yet, the Court of Appeals next proceeded to disavow the applicability of those rules of interpretation to the matter before it.

The decision in Desbien v. Penokee Farmers Union Coop. Ass'n, 228 Kan. 358, 552 P.2d 917 (1976) was cited for the proposition that where "the provisions of a written instrument are clear and unambiguous, there is no occasion for applying rules of construction." (App. A, p.4a). But, in Desbien the Kansas Supreme Court found an uncertain and ambiguous meaning based on a handwritten term inserted into a printed form contract observing that

"handwritten terms control typewritten or printed terms". Id. at 363, 552 P.2d at 923. That is precisely the situation presented by this case, and for the Court of Appeals to find that the Kansas Supreme Court would have disregarded the significance of the handwritten term "or assignee" is simply not plausible.

The Court's own comment to the effect that the handwritten term "clearly reflects that the parties contemplated that Newco might assign its rights" is an acknowledgment that the significance of the handwritten term cannot be ignored or minimized. Contrary to the Court's treatment of the phrase in its opinion, Kansas law requires that this term be given paramount importance. The added weight and deference accorded the handwritten term creates "uncertainty or doubt" as to the meaning, which in turn triggers the application of the pertinent rules of construction to the contract. Thereafter, if the application of the pertinent rules still does not resolve the uncertainty then, and only then, is an ambiguity deemed to exist requiring the admission of extrinsic parol evidence. Simon v. Nat'l Farmers Org., Inc., supra.

The bar on extrinsic evidence to contradict or construe an unambiguous agreement referenced in TMG Lake Ins. Co. v. Ashner, 21 Kan. App.2d 234, 898 P.2d 1145 (1995) which the Court also cited, resulted from the parties joint agreement that the guaranty at issue in this case was unambiguous. The case involved a lender's attempt to expand the guarantor's liability by implication which the court declined to do based on issues of guaranty law and the parties stipulation that the guaranty instrument was unambiguous. Contrast

that intermediate appellate court ruling with the holding of the Kansas Supreme Court in Wood River Pipeline Co. v. Willbros Energy Services, Co., 241 Kan. 580, 723 P.2d 866 (1987).[6]

In Wood River, both parties to a pipeline construction agreement argued a different interpretation of the same provision regarding indemnification. 241 Kan. at 582, 738 P.2d at 869. The trial court found that the contract was clear and unambiguous and did not apply the rules of contract construction. However, on appeal, the Kansas Supreme Court noted that "[i]n determining whether the contract in question is ambiguous, we are not limited to reviewing the district court's conclusions. Rather we have the same opportunity to consider and evaluate the evidence as did the district court." [citation omitted] Id. at 586, 738 P.2d at 871. The Court then proceeded to apply the rules of contract construction and affirmed the lower court's decision that the contract was clear and unambiguous. The Wood River Court's use of the rules of contract construction is consistent with the holdings of Weber v. Tillman, supra, and Desbien v. Penokee Farmers Union Co-Op Ass'n., supra, and is inconsistent with this Court's conclusion that the rules are inapplicable in the present situation.

In divining and applying the law in diversity of citizenship cases, a federal court functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court

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[6] The final authority cited by the Court of Appeals, Hall v. JFW, Inc., 20 Kan. App. 2d 845, 893 P.2d 837 (1995), involved the rules of construction for oil and gas leases, a sub-specialty of Kansas contract law. The issue there concerned whether a lessee had timely commenced operations for drilling a well and turned on the question of what constitutes commencement of drilling operations under established Kansas case law.

system. Newco did not receive that conscientious deliberation in this case.

C. The Court Of Appeals Improperly Expounded On An Unresolved Question Of Maryland Tort Law.

After concluding that the contract was unambiguous, the Court of Appeals then proceeded to hold that the negligent misrepresentation claim could not be maintained because such an assertion was "directly contradicted by specific language in the contract itself." (App. A, p.6a). The Court reasoned that Newco's reliance on Cessna's representation was unjustifiable as a matter of law because "one may not reasonably rely upon an oral statement when he has in his possession a contrary statement in writing." The Court reached its conclusion without the benefit of the question being briefed or argued by the parties.

In support of this conclusion, the Court cited to two decisions by the Fourth Circuit and one from the Maryland Court of Appeals. However, what the Court of Appeals regarded as an issue of "justifiable reliance" is in actuality a question involving the effect of the parol evidence rule on a tort action for negligent misrepresentation when a plaintiff simultaneously pursues both a tort and contract action based on the same set of facts. And, the Maryland Court of Appeals has not previously ruled on this precise question and, in fact, has expressly reserved ruling on the question.

In Weisman v. Conners, 312 Md. 428, 540 A.2d 783 (1988) the Maryland Court of Appeals discussed whether four representations which were grounded in the terms of a written employment contract could serve as a basis for an action in negligent misrepresentation. The court found that there was insufficient evidence for the representations to go to the jury, and therefore did not reach the separate issue of whether or not the presence of those

representations in a written contract precluded a tort action for negligent misrepresentation. In so holding, the court observed as follows:

> We nevertheless note that the availability of both tort and contract actions for the same kind of harm has engendered considerable confusion and complexity. See Prosser and Keaton on the Law of Torts §92 at 655 (5th ed. 1984). One thorny question concerns the effect that the parol evidence rule has on tort actions when the tort and contract actions are based on the same set of facts.
>
> In Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982), we reserved judgment on whether the parol evidence rule precluded a tort action based on a negligent misrepresentation that contradicted a term of the contract between the parties to the tort suit. 294 Md. at 119, n.13, 448 A.2d 332. We there affirmed the related principle that in a suit for recission of a contract the parol evidence rule precludes the granting of relief for unintentional representations preceding the contract which conflict with the terms of the contract. (emphasis supplied).

Id. at 456 n.4, 540 A.2d at 797 n.4.

The court went on to take notice of the Fourth Circuit decision in Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir. 1977) without expressing either approval or disapproval of the result reached in that case. The Call Carl decision was one of three authorities cited by the Court of Appeals in affirming dismissal of the negligent misrepresentation claim. The other two cases cited by the Court were inapposite to the issue. (App. A, p.6a).

The decision in Foremost Guarantee Corp. v. Meritor Savings Bank (App. A, p.6a) dealt with a suit for recission of a contract rather than breach of contract claim. The result in that case mirrors the decision of the Maryland Court of Appeals in Creamer v. Helferstay, supra which also involved a recission claim. As discussed above, the Maryland Court of Appeals in Creamer v. Helferstay, supra, declined to address the question of how the parol evidence rule impacted on a parallel tort claim for negligent misrepresentation. The James v. Goldberg (App. A, p.6a) decision from the Maryland Court of Appeals involved a fraud claim and not a negligent misrepresentation claim. It also predated recognition of the modern claim of negligent misrepresentation by Maryland which occurred in Martens Chevrolet, Inc. v. Seney [7] in 1982.

The Court of Appeals prediction of how the Maryland Court of Appeals might rule upon the issue conflicts with the well recognized doctrine of federal courts refraining from weighing policies and formulating state substantive law on a subject. See, e.g., Burris Chemical Inc. v. U.S.X. Corp., 10 F.3d 243, 247 (4th Cir. 1993). Even assuming that it was appropriate for the Court of Appeals to attempt a prediction as to how the Maryland Court of Appeals would rule on the issue, its analysis was not done "in accordance with the applicable principles for determining state law." Salve Regina College v. Russell, supra. In formulating this change in Maryland state law the Court of Appeals failed to consider all available legal resources such as treatises, law review commentaries, relevant state precedents, analogous decisions, considered dicta, scholarly work such as restatements of the law, decisions from other jurisdiction whose doctrinal approach is substantially the same and the "majority rule" as adopted by other states. See McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662-63 (3rd Cir.) cert. denied

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[7] 292 Md. 328, 439 A.2d 534 (1982).

449 U.S. 976 (1980). The portion of the Court of Appeal's opinion directed to the tort claim of negligent misrepresentation under Maryland law lacks any reliable data tending to convincingly show how the Maryland Court of Appeals would decide the issue.

CONCLUSION

As this Court observed in Salve Regina College, supra, independent appellate review necessarily entails a careful consideration of the legal analysis on the state law issues. Appellate indifference to determinations of state law is as much inconsistent with the principles underlying this Court's decision in Erie R.R. Co. v. Tompkins as is appellant deference to a lower court's legal analysis. The Court of Appeals decision personifies the denial of a litigant's access to meaningful review of state law claims under the federal court system. Such a lack of meaningful review "create[s] a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." Salve Regina College, supra. This type of result cannot be reconciled with the commands of Erie and can only be corrected by this Court's intervention.

For the reasons set forth above, Newco respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH M. MOTT
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(301) 996-4815
Attorneys for Petitioner

APPENDIX A — UNPUBLISHED PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED NOVEMBER 12, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1208

NEWCO, INCORPORATED,

Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Alexander Williams, Jr., District Judge.
(CA-96-2896-AW)

Argued: September 29, 1997

Decided: November 12, 1997

Before WILKINS, Circuit Judge, PHILLIPS, Senior Circuit Judge, and THORNBURG, United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

Appendix A

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Newco, Incorporated appeals an order of the district court dismissing its action against Cessna Aircraft Company for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). Finding no error, we affirm.

I.

The relevant allegations in Newco's complaint are as follows.[1] Cessna and Newco entered into a written contract for Cessna to sell to "Purchaser" an airplane for $6,295,000, payable in several installments. J.A. 8 (internal quotation marks omitted). Newco's president, Thomas L. Blair, advised Cessna's sales representative, Michael Dwyer, that Newco wanted the unlimited right to assign the contract to a third party. Dwyer represented that such an assignment would be permitted and demonstrated this understanding by handwriting the definition of "Purchaser" in the contract as "Newco, Inc. *or assignee*." *Id.* (emphasis added; internal quotation marks omitted). The contract also stated, however, that the "Agreement, including the rights of Purchaser

1. In reviewing a motion to dismiss for failure to state a claim, we consider well-pled allegations in the complaint as true and construe those allegations in favor of the plaintiff. *See Martin Marietta Corp. v. International Telecomms. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).

hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of Seller." J.A. 9 (emphasis and internal quotation marks omitted).

When Newco's second installment payment became due, Newco informed Cessna that the payment would not be made until Cessna verified that Newco had an unrestricted right to assign the contract and that until such verification Newco was placing the scheduled installment payments in a segregated account. Cessna refused to accede to Newco's position and ultimately declared Newco to be in default.

Newco subsequently filed this action, alleging that Cessna had repudiated the contract by failing to respond to Newco's request for adequate assurances made in accordance with the provisions of the Kansas Commercial Code. Newco also alleged that Cessna had negligently misrepresented that Newco had an unrestricted right to assign the contract.

The district court held that Newco had failed to state a claim for anticipatory repudiation, reasoning that because the contract unambiguously provided that Newco's assignability rights were not unrestricted, Newco had no reasonable grounds for insecurity and Cessna had no duty to provide Newco with adequate assurance that it would perform.[2] With regard to the

---

2. The parties agree that Kansas law governs the contract issues in this case and that Maryland law applies to the negligent misrepresentation issue. Under Kansas law, "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." Kan. Stat. Ann. § 84-2-609(1) (1996).

negligent misrepresentation claim, the district court held that Newco had failed to state a claim because it had not alleged facts that would give rise to a duty on the part of Cessna not to make negligent misrepresentations.

II.

Newco argues that the district court erred in concluding that the contract was unambiguous, in failing to apply several rules of contract construction, and in refusing to consider extrinsic evidence. We disagree.

In Kansas, "[t]he intent of the parties is determined from the four corners of an unambiguous instrument, harmonizing the language therein if possible." *Hall v. JFW, Inc.*, 893 P.2d 837, 840 (Kan. Ct. App. 1995). When "the provisions of a written instrument are clear and unambiguous, there is no occasion for applying rules of construction." *Desbien v. Penokee Farmers Union Coop. Ass'n*, 552 P.2d 917, 922 (Kan. 1976). Similarly, extrinsic evidence cannot be used to contradict or to construe an unambiguous agreement. *See TMG Life Ins. Co. v. Ashner*, 898 P.2d 1145, 1154 (Kan. Ct. App. 1995). "Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it generally uncertain which one of two or more meanings is the proper meaning." *Simon v. National Farmers Org., Inc.*, 829 P.2d 884, 888 (Kan. 1992). We review the dismissal of a complaint for failure to state a claim de novo. *See Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

Here, although the definition of "Purchaser" as "Newco, Inc. or assignee" clearly reflects that the parties contemplated that Newco might assign its rights, nothing in that definition

indicates an intention to grant Newco an unrestricted right of assignment. Therefore, in light of the specific contractual language restricting Newco's assignment rights, the district court was correct not to employ rules of construction or consider extrinsic evidence to resolve an ambiguity that did not exist.

Because Newco's insecurity was based on an unreasonable interpretation of the contract, Newco had no right to suspend its own performance. Accordingly, Cessna's declaration of default was within its rights, and the district court correctly dismissed Newco's claim for anticipatory repudiation.

III.

Newco next argues that the district court erred in dismissing the negligent misrepresentation claim on the basis that Newco had failed to allege facts that would give rise to a duty on the part of Cessna not to make negligent misrepresentations to Newco. We affirm, but on a basis different from the one offered by the district court. *See United States v. Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995) (holding that "an appellate court can affirm a trial court's opinion on different grounds than those employed by the trial court").

Under Maryland law, an action for negligent misrepresentation will lie only when the following five criteria are met:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
>
> (2) the defendant intends that his statement will be acted upon by the plaintiff;

(3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;

(4) the plaintiff, justifiably, takes action in reliance on the statement; and

(5) the plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet, Inc. v. Seney, 439 A.2d 534, 539 (Md. 1982).

Here, because Cessna's representation that Newco had an unrestricted right to assign the contract was directly contradicted by specific language in the contract itself, Newco's reliance on Cessna's representation was unjustifiable as a matter of law. *See Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118, 126 (4th Cir. 1990) (holding that under Maryland law, "one may not reasonably rely upon an oral statement when he has in his possession a contrary statement in writing"); *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 631 (4th Cir. 1977) (explaining that under Maryland law, a person cannot "reasonably [rely] upon . . . statements made in the face of plainly contradictory contractual language"); *James v. Goldberg*, 261 A.2d 753, 758 (Md. 1970) (ruling that a plaintiff had no right to rely upon allegedly false oral statements that contradicted a written agreement between the parties). The district court therefore correctly dismissed Newco's claim for negligent misrepresentation.

IV.

For the foregoing reasons, we affirm the dismissal by the district court of Newco's complaint for failure to state a claim.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, GRANTING CESSNA'S MOTION TO DISMISS AND DENYING NEWCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JANUARY 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AW-96-2896

NEWCO, INC.,

Plaintiff,

v.

THE CESSNA AIRCRAFT COMPANY

Defendant.

ORDER

This case came before the Court on Defendant's Motion To Dismiss and Plaintiff's Motion for Partial Summary Judgment. Both parties have filed Responses and Replies.

The Court held a hearing on January 27, 1997. After considering the entire file and listening carefully to the oral arguments presented at the hearing, the Court believes that Defendant's Motion to Dismiss must be granted.

First, the Court finds that the language of the contract in this case is not susceptible to two different meanings with regard

to whether Plaintiff had an unrestricted right of assignment. The contract clearly provides that "[t]his [a]greement, including the rights of [p]urchaser hereunder, may not be assigned by [p]urchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of [s]eller." This language can be read in harmony with the words "Newco, Inc. or assignee", which were written in the contract's preamble to define "purchaser." The Court does not believe that the presence of those words in the preamble operate to make the plain and straightforward language of the contract ambiguous. As a result, Plaintiff did not have an unrestricted right of assignment under the contract.

Second, the Court believes that Plaintiff's claim for negligent misrepresentation must be dismissed because Plaintiff and Defendant's relationship was solely contractural. Additionally, Plaintiff has failed to allege a tort duty of care owed to it by Defendant. Also, Plaintiff has not averred a "special relationship" between it and Defendant.

For the reasons set forth above and on the record, it is this 27th day of January, 1997 ORDERED

1. That Defendant's Motion To Dismiss as to Counts I and II of Plaintiff's Verified Complaint BE, and the same hereby IS, **GRANTED**; and

2. That Plaintiff's Motion for partial Summary Judgment on the issue of liability BE, and the same hereby IS, **DENIED**; and

3. That Defendant's Motion to Dismiss its Counterclaim under Fed. R. Civ. P. 41(c), without prejudice, BE, and the same hereby is **GRANTED**; and

Appendix B

4. That this Case is **CLOSED**; and

5. That the Clerk of the Court mail copies of this Order to all counsel of record.

s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Court Judge

APPENDIX C — ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, GRANTING CESSNA'S MOTION TO DISMISS AND DENYING NEWCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT DELIVERED ON JANUARY 27, 1997

* * *

[34] there was a contract and whether there was a breach of contract, then it will be important for us. If the Court finds that the contract is not ambiguous and as a matter of law that the complaint should be dismissed, then our understanding as a practical effect is there would be no challenge. We would be entitled to the $125,000 as a matter of law. Did I clarify or confuse?

THE COURT: Well, I'm not sure I agree with that. Well, let me make my ruling here. You can react to that.

Let me say this. I've had this case several months and I have observed the pleadings and discovery that has piled up in this case. As both of you recall or both sides recall, I had a hearing in my chambers when the case first was filed on a TRO and at the time, because I felt that irreparable harm wasn't there, that the aircraft had already been sold and the possibility of an adequate remedy at law by way of damages was available I denied the temporary restraining order. I believe that there was a preliminary injunction hearing requested but later recalled by the plaintiff or both sides or some notice came to chambers that you were moving ahead with some discovery.

I have before me two motions. One is a motion to dismiss filed by the defendant, the manufacturer of the aircraft, essentially saying that the two claims, that is, the anticipatory

breach and the negligent misrepresentation, just [35] cannot be established or made out. The plaintiff in this case opposes that and, in addition to opposing that motion to dismiss, has filed their own motion for summary judgment not only on the liability question of the main claim but also on the counterclaim which has been filed by the defendant. That's why I was trying to get some information as to the nature just to the counterclaim.

Now, stripped to the bare bones, this case really is about the construction of what we call a purchase agreement. I've looked at this thing over and over again trying to make some sense of it. As I initially said when I came on the bench, when the handwritten words "or assignee" was placed in, my initial reaction was that's just confusion. We are adding things that we don't need to, particularly when you have Section IV, subparagraph 6, which says, "This agreement is wholly integrated and is the sole agreement controlling the purchase and sale and is exclusive of any other express, implied, verbal, or written representations, or omissions or agreements, and is binding on the Purchase and Seller, their heirs, executors, administrators, successors or assigns. This agreement, including the rights of Purchaser hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor-in-interest by name change or otherwise and then only upon the prior written consent of Seller."

Now, I think that courts ought to take what I've always [36] considered to be a functional approach in statutory interpretation. What that means to me is that we look at the entire writing and we make every effort to see if we can harmonize it or read it together so that it will flow with some kind of common sense as to what they were attempting to say.

Appendix C

After listening to both sides argue here today, I just feel, Mr. Mott, that the kind of interpretation you want me to put on this agreement is not reasonable. It is unreasonable. It's stretching it. An I tend to think that the placing in handwriting the words "or assignee" just before the parenthesis "purchaser" is to be read and explained and defined consistent with Section IV, paragraph 6. In other words, paragraph 6 of Section IV clearly defines what is meant by an assignee. It says essentially a wholly — let me get the words right — "except to a wholly-owned subsidiary or successor-in-interest by name change or otherwise, and then only upon the written consent of the Seller."

I am finding today that there's nothing inconsistent about that paragraph as well as the preliminary or preface paragraph that simply hand-writes the word "assignee." I think that's the only way to read it. To stretch that meaning to suggest that the word "purchaser" includes Newco or an assignee and then there has to be another assessment of an assignment, in other words, permitting two assignments, to me is just stretching it too [37] far. It's an unreasonable interpretation of that contract and I just don't think that I should reach that conclusion. I think a reasonable functional approach is what I have to be guided by and that's what I will do.

Now, when inquiry was made about the balance that was due — not the balance due but the second deposit that was due or the installment that was due and wasn't paid, to me is a breach on behalf of the plaintiff. Plaintiff wants to say that they were willing to pay the $250,000 but not by Newco, the plaintiff, but by some assignee that did not meet the definition of the paragraph. I agree with Mr. Lynch that failing to abide or agree to an unreasonable interpretation of a contract is not an anticipatory breach. There was no anticipatory breach here. The

defendant had every right to insist that the assignment be in compliance with the agreement as set forth.

So, the whole dispute and controversy here really surrounds the interpretation of that paragraph and I believe that a reasonable interpretation is to find that they mean exactly the same thing and that there's a characterization and a category and a description for an "assignee."

So, claim number one, anticipatory breach, cannot be established. It's just not there. I agree that under no stretch of the imagination can you find anticipatory breach on these facts and I have to grant the defendant's motion for dismissal of that particular claim.

[38] With reference to the negligent misrepresentation, as I indicated before, Judge Garbis of the court as well as several other judges of this court as well as myself in several opinions that I have issued clearly subscribe to the view that under the Maryland law if the relationship is no more than a contractual one, then no special tort obligation can flow therefrom.

In this particular case it seems to me that the relationship is no more than contractural. There's no special relationship, no special nexus between the parties. I have read this case. I sat here and read this Lubore v. RPM Associates, Mr. Mott, that you just gave me. This case also cites the same rule I have just given you. It says here, "In an arm's length commercial transaction involving only economic loss, the duty of care for the tort of negligent misrepresentation may arise out of a special relationship or intimate nexus." This case goes on to tell us about two high level executives, one of which knew that the other had to get accurate information, otherwise they would

suffer significant economic harm. The court looked at the allegations and the pleadings and found that the allegations were such that it suggested a special relationship and a special nexus between the parties.

We don't have that in this case. It's just not there. This case is very consistent with the Garbis decision as well as the clear Maryland law on that point. So, with reference to the second claim the Court also will grant the motion to dismiss as [39] to the claim of negligent misrepresentation.

Now, conversely, Mr. Mott, having held the way I have held, obviously I must deny your motion for summary judgment as to the question of liability on your claim and I also must deny partial liability on the counterclaim that you have requested in your motion. So, I deny two facets of your motion for partial summary judgment.

Now, that's really all that's before me today. Where are we on the counterclaim?

MR. VENTKER: Your Honor, given those rulings, absent objection by Mr. Mott, under Rule 41 I'll move to dismiss our counterclaim at this time.

THE COURT: Under 41, a voluntary dismissal?

MR. VENTKER: Yes, sir.

THE COURT: All right. What's your position on that, counsel?

MR. MOTT: Well, Your Honor, that's fine.

THE COURT: All right.

MR. MOTT: Your Honor, if I could, I would make two items for the record.

THE COURT: Yes.

MR. MOTT: I wasn't sure how the process would work, Your Honor, in terms of — there was my summary and whether I had a reply. The only two points I would make, Your Honor, is that in discovery — I'm trying to create a record on appeal.

* * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING NEWCO INC.'S PETITION FOR REHEARING FILED DECEMBER 8, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1208
CA-96-2896-AW

NEWCO, INCORPORATED

Plaintiff-Appellant

v.

CESSNA AIRCRAFT COMPANY

Defendant-Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Appendix D

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — CONTRACT OF PURCHASE BETWEEN NEWCO, INC. AND THE CESSNA AIRCRAFT COMPANY DATED AUGUST 30, 1994

CITATION EXCEL PURCHASE AGREEMENT No. CJ-XL *0294*

This CITATION EXCEL PURCHASE AGREEMENT ("Agreement" is made and entered into on this *30* day of *August* by and between The Cessna Aircraft Company ("Seller") with a principal place of business at 1 Cessna Boulevard, Wichita, Kansas 67215 and *Newco, Inc. or assignee* ("Purchaser") with a principal place of business at *One Bank Street 3rd Floor Gaithersburg MD 20878*, for the sale of a Cessna CITATION EXCEL Model 560-XL aircraft (herein referred to as "Aircraft") as described in the Specification and Description dated *TBF* ("Specification"), a copy of which will be furnished hereto as Exhibit "A" as soon as available and incorporated herein by reference and made a part hereof, it is understood and agreed between the Seller and Purchaser that the Specification dated *TBF* added hereto as Exhibit A is preliminary in content and is subject to revision by the Seller upon development of final data for the Cessna CITATION EXCEL. Upon development of such final data for the Final Specification and Description ("Final Specification") for incorporation herein by reference, the same shall be deemed to supersede and replace said preliminary Specification. All other exhibits referred to in this Agreement are also hereby incorporated by reference herein.

The parties agree that the Purchaser shall pay Seller the Price, as hereinafter defined, for the Aircraft and Seller shall transfer good and clear title to the Aircraft to Purchaser under the following mutually agreed to terms and conditions:

1. BASE PRICE: The Base Price of the Aircraft is *$6,295,000*

Appendix E

Note: The Base Price shall be adjusted by the percentage difference in the Consumer Price Index, Urban Wage Earners and Clerical Workers (CPI-W) 1982–1984 = 100 as published by the U.S. Department of Labor, Bureau of labor Statistics, for the month of September 1994 and the month of November *1997*.

2. OPTIONAL EQUIPMENT AND MISCELLANEOUS CHARGES; The Option Price Listed dated *TBF* is effective for aircraft delivering in 1997/1998:

Optional Equipment to be Selected by Purchaser nine (9) months prior to Preliminary Delivery Date.

Optional Equipment and Miscellaneous Charges	$ TBF
TOTAL PURCHASE PRICE:	$ TBF

3. PAYMENT TERMS:

a. Initial Deposit	$125,000
b. Second Deposit due twenty-four (24) months prior to Preliminary Delivery Date	$250,000
c. Third Deposit due twelve (12) months prior to Preliminary Delivery Date	$250,000
d. Fourth Deposit due six (6) months prior to Preliminary Delivery Date	$250,000
e. Balance due upon Aircraft Delivery	$ TBF

Appendix E

4. PRELIMINARY DELIVERY DATE: Preliminary Delivery Date F.O.B. Wichita, Kansas is ~~*TBF*~~ [*2CD QUARTER, 1998*]

5. SCHEDULED DELIVERY DATE: Scheduled Delivery Date will be established by Seller 180 days prior to the Preliminary Delivery Date and notification thereof will be furnished to Purchaser.

6. ORDER DUE DATE: *TBF*

7. SPECIAL CONDITIONS: Due to the time span between the date of this Purchase Agreement and the Scheduled Delivery Date of the Aircraft, Seller reserves the right to revise the Specification whenever occasioned by product improvements, U.S. Government regulations, or other good manufacturing and/or vendor cause as long as such revisions do not result in a reduction in guaranteed Aircraft performance standards, as defined in the Specification. Seller shall notify Purchaser of any such revisions.

8. TRADE-IN AGREEMENT: A Trade-In Agreement *is not* part of this Agreement. **(Circle and initial one).**

9. LIMITED WARRANTY: The Price includes a Cessna Limited Warranty as defined in Exhibit A. EXCEPT FOR THE EXPRESS TERMS OF SELLER'S WRITTEN LIMITED WARRANTIES PERTAINING TO THE AIRCRAFT, WHICH ARE SET FORTH IN THE SPECIFICATION (EXHIBIT A), SELLER MAKES NO REPRESENTATIONS OR WARRANTIES EXPRESS OR IMPLIED, OF MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OR OTHERWISE WHICH EXTEND BEYOND THE FACE HEREOF OR

Appendix E

THEREOF, SELLER SPECIFICALLY EXCLUDES AND DISCLAIMS ANY AND ALL REPRESENTATIONS AND/OR WARRANTIES NOT INCLUDED WITHIN THE FOUR CORNERS OF THIS AGREEMENT. THE WRITTEN LIMITED WARRANTIES OF SELLER ACCOMPANYING ITS PRODUCT ARE IN LIEU OF ANY OTHER OBLIGATION OR LIABILITY WHATSOEVER BY REASON OF THE MANUFACTURE, SALE, LEASE, OR USE OF THE WARRANTED PRODUCTS AND NO PERSON OR ENTITY IS AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES OR TO ASSUME ANY OBLIGATIONS ON BEHALF OF SELLER. THE REMEDIES OF REPAIR OR REPLACEMENT SET FORTH IN SELLER'S WRITTEN LIMITED WARRANTIES ARE THE ONLY REMEDIES UNDER SUCH WARRANTIES OR THIS AGREEMENT. IN NO EVENT SHALL SELLER BE LIABLE TO PURCHASER OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS OR GOODWILL, LOSS OF USE, LOSS OF TIME, INCONVENIENCE, OR COMMERCIAL LOSS. THE ENGINES AND ENGINE ACCESSORIES ARE SEPARATELY WARRANTED BY THEIR MANUFACTURER AND ARE EXPRESSLY EXCLUDED FROM THE LIMITED WARRANTIES OF SELLER. THE LAWS OF SOME STATES DO NOT PERMIT CERTAIN LIMITATIONS ON WARRANTIES OR REMEDIES. IN THE EVENT SUCH A LAW APPLIES, THE FOREGOING EXCLUSIONS AND LIMITATIONS ARE AMENDED INSOFAR AND ONLY INSOFAR AS REQUIRED BY SAID LAW.

Appendix E

SECTION I — Prices and Payments

1. The price of the Aircraft hereby purchased and sold and other applicable charges are set forth on page 1 hereof and include CITATION EXCEL Standard Equipment, optional equipment selected by Purchaser as listed in Item 2, technical and service publications, computerized Maintenance Record Service (CESCOM) for a period of (1) year, and training for pilot and maintenance personnel in accordance with the CITATION EXCEL Crew Training Agreement as set forth in the Specification (Exhibit A). The price is subject to adjustment for the additional payments, if any, to be made by Purchaser as set forth in Section III, Clauses 2 and 3 below.

2. All payments shall be made in United States dollars at Wichita, Kansas, U.S.A., and shall be made by certified check, bank cashier's check, wire transfer or such other negotiable instruments as may be acceptable to Seller.

SECTION II — Seller Agrees

1. To provide the Aircraft to Purchaser in accordance with the Specification and Description (Exhibit A) as modified in writing by mutual agreement of the parties. In the event of conflict, the terms and conditions of this Agreement exclusive of Exhibit A take precedence over terms and conditions expressed in Exhibit A.

2. To notify Purchaser of the Scheduled Delivery Date at least six (6) months prior to the Preliminary Delivery Date, and to confirm or adjust the date at least 30 days prior to the Scheduled Delivery Date by notifying Purchaser of the day the Aircraft will be ready for delivery.

Appendix E

3. To furnish to Purchaser at the time of delivery of the Aircraft a Bill of Sale on the appropriate Federal Aviation Administration from transferring ownership to the Aircraft to the Purchaser free and clear of all encumbrances, unless otherwise agreed to by the parties.

SECTION III — Purchaser Agrees

1. Except as set forth in Section IV, Clause 3, all deposits shall be retained by Seller not as a forfeiture but as liquidated damages for default if this Agreement is breached, cancelled, or terminated by Purchaser for any cause whatsoever, whereuopn this Agreement shall end. Purchaser's failure to timely pay any deposits, the balance due on the Aircraft, or any other changes under this Agreement when due, shall constitute a breach of this Agreement. Retention of Purchaser's deposits shall be Seller's sole remedy for Purchaser's default.

2. Any changes or addition requested after the Order Due Date shall be subject to additional charges and approval by Seller. Should any changes or additions delay the delivery of the Aircraft, Seller shall be authorized to adjust the Scheduled Delivery Date upon written notice to Purchaser. Purchaser agrees Seller shall appoint the Aircraft in Seller's demonstration aircraft configuration, as detailed in Exhibit A-1, which will be furnished to Purchaser at least 30 days prior to order Due Date, if Purchaser fails to submit an order for optional equipment and interior and exterior selections by the Order Due Date.

3. To pay for (i) additional or substituted optional equipment order by Purchaser pursuant to Paragraph 2 immediately above; (ii) Seller's charges, if any, for charges or additions requested by Purchaser; (iii) any national, state, or

local taxes other than taxes on income applicable to this sale or transaction whether imposed on either Purchaser or Seller (whether imposed at the time of delivery and sale or thereafter); (iv) transportation charges for delivery if other than at Wichita, Kansas; (v) any import duties, import taxes, or other import charges imposed by other than the United States Government; and (vi) any other applicable charges.

4. Within seven (7) days after the Scheduled Delivery Date, to inspect, flight test, and accept delivery of the Aircraft at Wichita, Kansas, and to pay Seller the balance due on the Aircraft and all other charges due under this Agreement (less appropriate credit for trade-in aircraft where applicable). In all events, the full balance due on the Aircraft and all other charges shall be paid no later than seven (7) days following the Scheduled Delivery Date or upon delivery of the Aircraft, whichever first occurs. If any charges are not known at the time, the same shall be paid immediately upon advice.

5. To pay Kansas State Sales Tax or to execute a Kansas State Sales Tax Exemption Certificate.

SECTION IV — General Terms

1. Prior to acceptance by Purchaser, the Aircraft shall be subject to inspection and a flight test of not more than two (2) hours' duration controlled by Seller and participated in by not more than (2) of Purchaser's representatives. Seller shall have a reasonable time to correct any discrepancies disclosed by such flight test and, if necessary, the Scheduled Delivery Date will be adjusted accordingly. Acceptance of the Aircraft, as evidenced by receipt acknowledging delivery, shall constitute Purchaser's agreement that the Aircraft conforms to the specifications,

standards, and other requirements of this Agreement or is otherwise acceptable to Purchaser.

2. Risk of loss shall pass from Seller to Purchaser upon execution of receipt acknowledging delivery of the Aircraft.

3. Seller shall not be liable to Purchaser for any delay in making delivery for any cause whatsoever, provided, however, if Seller should fail to make delivery within ninety (90) days after the Scheduled or Rescheduled Delivery Date and such failure is not due to fire, flood, strikes, or other industrial disturbances, accident, war, riot, insurrection, delay in vendor deliveries, market conditions, or other causes beyond the control of the Seller, or if for any reason Seller should fail to make delivery within one hundred (180) days after the Scheduled Delivery Date, Purchaser shall have the right to demand return of all deposits plus interest, unless Purchaser agrees to a later Scheduled Delivery Date. If Purchaser makes such a demand, interest on returned deposits shall be computed from the date of receipt of the respective deposits by Seller to the date Seller forwards the refund to Purchaser, at the prime rates in effect from time to time at Chase Manhattan Bank, New York, New York. Upon return of deposits plus interest, this Agreement shall end. Purchaser agrees that its sole remedy for any failure of Seller to perform any part of this Agreement is limited to the return of deposits plus interest.

4. CESCOM reports will be furnished Purchaser at no additional charge for one (1) year from date of delivery provided Purchaser furnishes Seller the required data and information. CESCOM does not replace Purchaser's obligation to comply with applicable governmental regulations as to maintenance, repair, and operation of the Aircraft. CESCOM reports to be

furnished by Seller will be based on information furnished by Purchaser and other owners of CITATION EXCEL aircraft. Seller shall have no liability because of any errors in or omissions from such CESCOM reports.

5. Any notices given pursuant to this Agreement shall be sent by registered or certified mail, courier service, or telefax addressed, in case of notice to Seller, to Vice President, Administration, Citation Marketing, The Cessna Aircraft Company, P.O. Box 7706, Wichita, Kansas 67277, Telefax No. 316/941-6640, and in case of notice to the Purchaser to the name and address appearing on page 1 of this Agreement, or such other address as the party to receive the notice from time to time shall designate in writing.

6. This Agreement is wholly integrated and is the sole agreement controlling this purchase and sale and is exclusive of any other express, implied, verbal, or written representations, omissions, or agreements, and is binding on Purchaser and Seller, their heirs, executors, administrators, successors or assigns. This Agreement, including the rights of Purchaser hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of Seller. Purchaser acknowledges receipt of a written copy of this Agreement which may not be modified in any way except by written agreement executed by authorized representatives of all parties.

7. If Seller is the prevailing party in legal proceedings to enforce Clause 3 (iii) or Clause 3 (v) of Section III hereof, then Seller shall be entitled to recover all expenses, including attorney's fees and costs.

Appendix E

8. If any portion of this Agreement is invalid or unenforceable, this Agreement shall be considered divisible as to such provisions and the remained of the Agreement valid and binding as though such provisions were not included herein.

9. Purchaser and Seller expressly agree to exclude from this Agreement the United Nations Convention on Contracts for the International Sale of Goods, 1980, and any successor thereto. This Agreement shall be governed in all respects and shall be construed, and the legal relationships between the parties shall be determined, in accordance with applicable commercial law of the State of Kansas, U.S.A., including, but not limited to, the Uniform Commercial Code, as the same may be enacted and in force from time to time in that jurisdiction, but unless Purchaser is an individual residing in the state of Kansas, the provisions of the Kansas Consumer Protection Act, K.S.A. 50-623, et. seq. as may be in effect from time to time, shall not apply to this Agreement or the parties hereto. This Agreement shall become a binding contract upon its final acceptance and execution by Seller Wichita, Kansas.

10. The Signatories to this Agreement verify that they have read the complete Agreement, understand its contents, and have full authority to bid and hereby do bind their respective parties.

PURCHASER	SELLER
NEWCO, INC.	The Cessna Aircraft Company
By: s/ illegible	By: s/ illegible
Title: President	Title: Vice President, Administration
Date: Aug. 30th 1994	Date: August 31, 1994

* *Purchaser reserves the right to the extra 100,000 sales allowance offered in the Citation Jet/Excel sales program in the event that Purchaser purchases the Citation Jet within 45 days.*